

AN ACT to amend Tennessee Code Annotated, Title 68, Chapter 215, relative to petroleum underground storage tanks.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 68, Chapter 215, is amended by adding the following Section 2 through 5 as a new Part 2.

SECTION 2. Definitions. As used in this chapter unless the context other requires:

(1) "Borrower," "debtor," or "obligor" is a person whose petroleum underground storage tank is encumbered by a security interest. These terms are used interchangeably.

(2) "Foreclosure" or "foreclosure and its equivalent" means purchase at a foreclosure sale, acquisition or assignment of title in lieu of foreclosure, termination of a lease or other repossession, acquisition of right to title or possession, an agreement in satisfaction of the obligation, or any other formal or informal manner (whether pursuant to law under warranties, covenants, conditions, representations or promise from the borrower) by which the holder acquires title to or possession of secured property.

(3) "Holder" is a person who maintains indicia of ownership primarily to protect a security interest. A holder includes the initial holder or purchaser (such as a loan originator), any subsequent holder (such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market), any subsequent assignee, transferee or purchaser from a holder, guarantor of an obligation, surety, or any other person who holds ownership who acts on behalf of or for the benefit of a holder.

(4) "Indicia of ownership" means evidence of a security interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligations, including any legal or equitable title to real or personal

property acquired incident to foreclosure and its equivalents. Evidence of such interests includes, but is not limited to mortgages, deeds of trust, liens, surety bonds and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not select initially the leased property (herein "lease financing transaction"), legal or equitable title obtained pursuant to foreclosure, and its equivalents. Evidence of such interests also includes assignments, pledges, or other rights to or other forms of encumbrances against property that are held primarily to protect a security interest. A person is not required to hold title or a security interest in order to maintain indicia of ownership.

(5) "Operation" means, for purposes of this part, the use, storage, filling, or dispensing of petroleum contained in a petroleum site or petroleum underground storage tank.

(6) "Primarily to protect a security interest" means that the holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation, but does not include indicia of ownership held primarily for investment purposes, nor ownership indicia held primarily for purposes other than as a protection of a security interest. A holder may have other, secondary reasons for maintaining indicia of ownership, but the primary reason why ownership indicia are held shall be for protection of a security interest.

(7) "Security interest" means an interest in a petroleum underground storage tank or established for the purpose of securing a loan or other obligation. Security interests include, but are not limited to, mortgages, deeds of trust, liens, and title pursuant to lease financing transaction. Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements, accounts receivable financing arrangements, inventory and/or other personal property financing arrangements and consignments, if the

transaction creates or establishes an interest in a petroleum underground storage tank for the purpose of securing a loan or other obligation.

SECTION 3. Ownership of petroleum site or petroleum underground storage tank or property on which a petroleum site or petroleum underground storage tank is located. A holder is not an “owner” of a petroleum site or a petroleum underground storage tank or property on which a petroleum site or petroleum underground storage tank is located, provided the party does not participate in the management of the petroleum underground storage tank as defined in this part.

SECTION 4.

(a) Operating a petroleum site or petroleum underground storage tank prior to foreclosure. A holder, prior to foreclosure, as defined in this part, is not an “operator” of a petroleum site or petroleum underground storage tank, provided that, after the effective date of this act, the holder is not in control of or does not have responsibility for the daily operation of the petroleum underground storage tank.

(b) Operating a petroleum site or petroleum underground storage tank system after foreclosure. The following provisions apply to a holder who, through foreclosure, as defined in T.C.A. § 68-212-401, acquires a petroleum site or petroleum underground storage tank or property on which a petroleum site or petroleum underground storage tank is located.

(1) A holder is not an “operator” of a petroleum site or petroleum underground storage tank system if there is an operator, other than the holder, who is in control of or has responsibility for the daily operation of the petroleum underground storage tank, and who can be held responsible for compliance with applicable requirements.

(2) If another operator does not exist, as provided for under paragraph (b)(1) of this section, a holder is not an “operator” of the petroleum underground storage tank, for purposes of compliance with applicable federal, state and local laws and regulations, provided that the holder:

(i) Empties all of its known petroleum underground storage tanks within sixty (60) calendar days after foreclosure or within sixty (60) calendar days after the effective date, whichever is later, or another reasonable time period specified by the implementing agency, so that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the petroleum underground storage tank, remains in the tank; leaves vent lines open and functioning; and caps and secures all other lines, pumps, manways, and ancillary equipment; and

(ii) Empties those petroleum underground storage tanks that are discovered after foreclosure within sixty (60) calendar days after discovery or within sixty (60) calendar days after the effective date, whichever is later, or another reasonable time period specified by the implementing agency, so that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the petroleum underground storage tank, remains in the tank; leaves vent lines open and functioning; and caps and secures all other lines, pumps, manways, and ancillary equipment.

(3) If another operator does not exist, as provided for under paragraph (b)(1) of this section, in addition to satisfying the conditions under paragraph (b)(2) of this section, the holder must either:

(i) Permanently close the petroleum underground storage tank in accordance with applicable federal, state, or local laws or regulations; or

(ii) Temporarily close the petroleum underground storage tank in accordance with applicable federal, state or local laws or regulations:

(A) Continue operation and maintenance of corrosion protection;

(B) Report suspected releases to the Department of Environment and Conservation; and

(C) Conduct a site assessment if the petroleum underground storage tank is temporarily closed for more than twelve (12) months and the petroleum underground

storage tanks does not meet either the applicable performance standards for new petroleum underground storage tank or the upgrading requirements, except that the spill and overfill equipment requirements do not have to be met. The holder must report any suspected releases to the implementing agency. For purposes of this provision, the twelve (12) month period begins to run from the effective date of this act or from the date on which the petroleum underground storage tank is emptied and secured under paragraph (b)(2) of this section, whichever is later.

(4) The petroleum underground storage tank can remain in temporary closure until a subsequent purchaser has acquired marketable title to the petroleum underground storage tank or property on which the petroleum underground storage tank is located. Once a subsequent purchaser acquires marketable title to the petroleum underground storage tank or property on which the petroleum underground storage tank is located, the purchaser must decide whether to operate or close the petroleum underground storage tank in accordance with applicable federal requirements or applicable state requirements.

SECTION 5. Participation in the management of a petroleum site or a petroleum underground storage tank. The term “participating in the management of a petroleum site or petroleum underground storage tank” means that, the holder is engaging in decision-making control of, or activities related to, the operation of petroleum underground storage tank as defined herein.

(a) Actions that are participation in management include:

(1) Participation in the management of a petroleum site or petroleum underground storage tank means, for purposes of this act, actual participation by the holder in the management or control of decisionmaking related to the operation of a petroleum site or petroleum underground storage tank system. Participation in management does not include the mere capacity or ability to influence or the unexercised right to control a

petroleum site or petroleum underground storage tank operation. A holder is participating in the management of petroleum underground storage tank only if the holder either:

(i) Exercises decisionmaking control over the operational (as opposed to financial or administrative) aspects of petroleum underground storage tank, such that the holder has undertaken responsibility for all or substantially all of the management of petroleum underground storage tank; or

(ii) Exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decisionmaking of the enterprise with respect to all, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise.

(2) Operational aspects of the enterprise relate to the use, storage, filling, or dispensing of petroleum contained in a petroleum underground storage tank, and include functions such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer. Financial or administrative aspects include functions such as that of a credit manager, accounts payable/receivable manager, personnel manager, controller, chief financial officer, or similar functions. Operational aspects of the enterprise do not include the financial or administrative aspects of the enterprise, or actions associated with environmental compliance, or actions undertaken voluntarily to protect the environment in accordance with applicable, federal, state or local laws, regulations or ordinances.

(b) Actions that are not participation in management pre-foreclosure.

(1) Actions at the inception of the loan or other transaction. No act or omission prior to the time that indicia of ownership are held primarily to protect a security interest constitutes evidence of participation in management within the meaning of this act. A prospective holder who undertakes or requires an environmental investigation (which could

include a site assessment, inspection, and/or audit) of petroleum underground storage tank or property on which petroleum underground storage tank is located (in which indicia of ownership are to be held), or requires a prospective borrower to clean up contamination from petroleum underground storage tank or to comply or come into compliance (whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest) with any applicable law or regulation, is not by such action considered to be participating in the management of petroleum underground storage tank or property on which petroleum underground storage tank is located.

(2) Loan policing and work out. Actions that are consistent with holding ownership indicia primarily to protect a security interest do not constitute participation in management for purposes of this act. The authority for the holder to take such actions may, but need not, be contained in contractual or other documents specifying requirements for financial, environmental, and other warranties, covenants, conditions, representations or promises from the borrower. Loan policing and work out activities cover and include all such activities that constitute participation in management.

(i) Policing the security interest or loan.

(A) A holder who engages in policing activities prior to foreclosure will remain within the exemption provided that the holder does not, together with other actions, participate in the management of petroleum underground storage tank. Such policing actions include, but are not limited to, requiring the borrower to clean up contamination from petroleum underground storage tank during the term of the security interest; requiring the borrower to comply or come into compliance with applicable federal, state, and local environmental, and other laws, rules, and regulations during the term of the security interest; securing or exercising authority to monitor or inspect the petroleum underground storage tank or property on which the petroleum underground storage tank is located (including on-site inspections) in which indicia of ownership are maintained, or the borrower's business or

financial condition during the term of the security interest; or taking other actions to adequately police the loan or security interest (such as requiring a borrower to comply with any warranties, covenants, conditions, representations, or promises from the borrower).

(B) Policing activities also include undertaking by the holder of environmental compliance actions and voluntary environmental actions taken in compliance with applicable federal, state or local standards, provided that the holder does not otherwise participate in the management or daily operation of the petroleum underground storage tank as provided in this section and section 4. Such allowable actions include, but are not limited to, release detection and release reporting, release response and corrective action, temporary or permanent closure of a petroleum site or petroleum underground storage tank petroleum underground storage tank upgrading or replacement, and maintenance of corrosion protection. A holder who undertakes these actions must do so in compliance with the applicable federal requirements or applicable state requirements. A holder may directly oversee these environmental compliance actions and voluntary environmental actions, and directly hire contractors to perform the work, and is not by such actions considered to be participating in the management of the petroleum underground storage tank.

(ii) Loan work out. A holder who engages in work out activities prior to foreclosure will remain within the exemption provided that the holder does not, together with other actions, participate in the management of the petroleum underground storage tank. For purposes of this rule, “work out” refers to those actions by which a holder, at any time prior to foreclosure, seeks to prevent, cure, or mitigate a default by the borrower or obligor; or to preserve, or prevent the diminution of, the value of the security. Work out activities include, but are not limited to, restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an

obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations, or promises from the borrower.

(c) Foreclosure on a petroleum site or petroleum underground storage tank or property on which a petroleum site or petroleum underground storage tank is located, and participation in management activities post-foreclosure.

(1) Foreclosure. (i) Indicia of ownership that are held primarily to protect a security interest include legal or equitable title or deed to real or personal property acquired through or incident to foreclosure. The indicia of ownership held after foreclosure continue to be maintained primarily as protection for a security interest provided that the holder undertakes to sell, re-lease a petroleum site or petroleum underground storage tank or facility or property on which the petroleum underground storage tank is located, held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest itself of the petroleum underground storage tank or property on which the petroleum underground storage tank is located, in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the petroleum underground storage tank system or facility or property on which the petroleum underground storage tank is located, taking all facts and circumstances into consideration, and provided that the holder does not participate in management prior to or after foreclosure.

(ii) For purposes of establishing that a holder is seeking to sell, re-lease pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or divest in a reasonably expeditious manner a petroleum site or petroleum underground storage tank or property on which the petroleum underground storage tank is

located, the holder may use whatever commercially reasonable means as are relevant or appropriate with respect to the petroleum underground storage tank or property on which the petroleum underground storage tank is located, or may employ the means specified in this section. A holder that outbids, rejects, or fails to act upon a written bona fide, firm offer of fair consideration for the petroleum underground storage tank or property on which the petroleum underground storage tank is located, as provided in this section, is not considered to hold indicia of ownership primarily to protect a security interest.

(2) Holding foreclosed property for disposition and liquidation. A holder, who does not participate in management prior to or after foreclosure, may sell, re-lease, pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), a petroleum site or petroleum underground storage tank or property on which the petroleum underground storage tank is located, liquidate, wind up operations, and take measures, prior to sale or other disposition including, but not limited to, apply to, and take full advantage of the petroleum underground storage tank fund to preserve, protect, or prepare the secured petroleum site or petroleum underground storage tank or property on which the petroleum underground storage tank is located. A holder may also arrange for an existing or new operator to continue or initiate operation of the petroleum underground storage tank. The holder may conduct these activities without voiding the security interest exemption, subject to the requirements of this part.

(i) A holder establishes that the ownership indicia maintained after foreclosure continue to be held primarily to protect a security interest by, within twelve (12) months following foreclosure, listing the petroleum underground storage tank or property on which the petroleum underground storage tank is located, with a broker, dealer, or agent who deals with the type of property in question, or by advertising the petroleum underground storage tank or property on which the petroleum underground storage tank is located, as being for sale or disposition on at least a monthly basis in either a real estate publication or

a trade or other publication suitable for the petroleum underground storage tank or facility or property on which the petroleum underground storage tank is located, or a newspaper of general circulation (defined as one suitable under any applicable federal, state, or local rules of court for publication required by court order or rules of civil procedure) covering the location of the petroleum underground storage tank or property on which the petroleum underground storage tank is located. For purposes of this provision the twelve (12) month period begins to run from the effective date of this act or from the date that the marketable title or deed has been issued, approved and recorded, and the holder has obtained access to the petroleum underground storage tank and property on which the petroleum underground storage tank is located, whichever is later, provided that the holder acted diligently to acquire marketable title or deed and to obtain access to the petroleum underground storage tank and property on which the petroleum underground storage tank is located. If the holder fails to act diligently to acquire marketable title or deed or to gain access to the petroleum underground storage tank, the 12-month period begins to run from the effective date of this act or from the date on which the holder first acquires either title to or possession of the secured petroleum site or petroleum underground storage tank or property on which the petroleum underground storage tank is located, whichever is later.

(ii) A holder that outbids, rejects, or fails to act upon an offer of fair consideration for the petroleum underground storage tank or property on which the petroleum underground storage tank is located, establishes by such outbidding, rejection, or failure to act, that the ownership indicia in the secured petroleum site or petroleum underground storage tank or property on which the petroleum underground storage tank is located are not held primarily to protect the security interest, unless the holder is required, in order to avoid liability under federal or state law, to make a higher bid, to obtain a higher offer, or to seek or obtain an offer in a different manner.

(A) Fair consideration, in the case of a holder maintaining indicia of ownership primarily to protect a senior security interest in the petroleum underground storage tank or property on which the petroleum underground storage tank is located, is the value of the security interest as defined in this section. The value of the security interest includes all debt and costs incurred by the security interest holder, and is calculated as an amount equal to or in excess of the sum of the outstanding principal (or comparable amount in the case of a lease that constitutes a security interest) owed to the holder immediately preceding the acquisition of full title (or possession in the case of a lease financing transaction) pursuant to foreclosure, plus any unpaid interest, rent, or penalties (whether arising before or after foreclosure). The value of the security interest also includes all reasonable and necessary costs, fees, or other charges incurred by the holder incident to work out, foreclosure, retention, preserving, protecting, and preparing, prior to sale, the petroleum underground storage tank or property on which the petroleum underground storage tank is located, re-lease, pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), of a petroleum site or petroleum underground storage tank or property on which the petroleum underground storage tank is located, or other disposition. The value of the security interest also includes environmental investigation costs (which could include a site assessment, inspection, and/or audit of the petroleum underground storage tank or property on which the petroleum underground storage tank is located), and corrective action costs incurred under applicable federal, state, and local laws or regulations or any other costs incurred as a result of reasonable efforts to comply with any other applicable federal, state or local law or regulation; less any amounts received by the holder in connection with any partial disposition of the property and any amounts paid by the borrower (if not already applied to the borrower's obligations) subsequent to the acquisition of full title (or possession in the case of a lease financing transaction) pursuant to foreclosure. In the case of a holder

maintaining indicia of ownership primarily to protect a junior security interest, fair consideration is the value of all outstanding higher priority security interests plus the value of the security interest held by the junior holder, each calculated as set forth in this paragraph.

(B) Outbids, rejects, or fails to act upon an offer of fair consideration means that the holder outbids, rejects, or fails to act upon within ninety (90) days of receipt, a written, bona fide, firm offer of fair consideration for the petroleum underground storage tank or property on which the petroleum underground storage tank is located received at any time after six (6) months following foreclosure, as defined in this section. A “written, bona fide, firm offer” means a legally enforceable, commercially reasonable, case offer solely for the foreclosed petroleum site or petroleum underground storage tank or property on which the petroleum underground storage tank is located, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder’s satisfaction the ability to perform. For purposes of this provision, the six (6) month period begins to run from the effective date of this act or from the date that marketable title or deed has been issued, approved and recorded to the holder, and the holder has obtained access to the petroleum site or petroleum underground storage tank and property on which the petroleum underground storage tank is located, whichever is later, provided that the holder was acting diligently to acquire marketable title or deed and to obtain access to the petroleum underground storage tank and property on which the petroleum underground storage tank is located. If the holder fails to act diligently to acquire marketable title or deed or to gain access to the petroleum underground storage tank, the six (6) month period begins to run from the effective date of this act or from the date on which the holder first acquires either title to or possession of the secured petroleum site or petroleum underground storage tank or property on which the petroleum underground storage tank is located, whichever is later.

(3) Actions that are not participation in management post-foreclosure. A holder is not considered to be participating in the management of an petroleum site or petroleum underground storage tank or property on which the petroleum underground storage tank is located, provided that the holder does not otherwise participate in the management or daily operation of the petroleum underground storage tank as provided in this part. Such allowable actions include, but are not limited to, release detection and release reporting, release response and corrective action (through use of petroleum underground storage tank fund or otherwise), temporary or permanent closure of a petroleum site or petroleum underground storage tank, upgrading or replacement, and maintenance of corrosion protection. A holder who undertakes these actions must do so in compliance with the applicable requirements of federal law or applicable state requirements. A holder may directly oversee these environmental compliance actions and voluntary environmental actions, and directly hire contractors to perform the work, and is not by such action considered to be participating in the management of the petroleum underground storage tank.

SECTION 6. This act shall take effect upon becoming a law, the public welfare requiring it.

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